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Supreme Court of the United States

October Term, 1977.

No. 77-1275.

MARTIN B. GLAUSER DODGE CO.,
Petitioner,

v.

CHRYSLER CORPORATION, et al.,
Respondents.

PETITIONER'S REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI.

RALPH S. SPRITZER,
3400 Chestnut Street,
Philadelphia, Pa. 19104

TOM P. MONTEVERDE,
MORRIS L. CHUCAS,
MAX L. LIEBERMAN,
PELINO, WASSERSTROM, CHUCAS & MONTEVERDE,
2300 Packard Building,
Philadelphia, Pa. 19102
(215) 665-8550
Attorneys for Petitioner.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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PETITIONER'S REPLY BRIEF SUPPORTING PETITION FOR WRIT OF CERTIORARI.

Respondents have failed to meet the Questions actually raised by petitioner. In the process they have characterized evidentiary matters in ways inconsistent with the verdict of the antitrust jury.

In order to place this case properly in focus, we shall, *first*, restate briefly petitioner's actual position as distinguished from that attributed to it by respondents; *second*, point out that respondents have signally failed to show that the questions raised by petitioner's contentions are lacking in importance.

I.

Contrary to respondents' repeated suggestions, we do not question Chrysler's prerogative to establish additional dealerships in the interest of enhancing its sales. Nor do we argue that Chrysler's efforts in creating and supporting new dealerships would make it vulnerable to attack under the antitrust laws merely because the incidental effect of injecting added competition at the dealer level might prove hurtful to some of the existing franchisees. Finally, we are not contending that Chrysler's establishment and support of DE dealers who competed with the petitioner is actionable simply because Chrysler could draw upon a deep pocket.[1]

1. In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1977), the Court held that private bowling alley proprietors could not recover damages simply by showing that they could have obtained additional profits if a manufacturer of bowling alley equipment had not attempted to recover sums owed it by failing bowling alleys which competed with those of the plaintiffs by taking over the operations of those alleys. The key fact in *Brunswick* was the Court's finding that, after obtaining control of the competing bowling alleys, Brunswick operated them properly and competed lawfully. As the Court pointed out, 429 U. S. at 490, Brunswick's "• • • contemporaneous business records • • • reveal(ed) that it did not lower prices when it took over the centers," and "• • •

That was not petitioner's theory at the trial, and it was not the theory upon which the case was submitted to the jury. Our position, briefly stated, is that it is one thing for a manufacturer like Chrysler to establish newly sponsored and supported dealerships that will compete on comparable terms with existing dealers who have ventured substantial capital in order to operate as Chrysler's franchisees; [2] it is quite another to discriminate sharply in favor of the newly created company-dominated dealers, extending to them terms, conditions and support not available to competitor dealers and calculated to damage or destroy the latter. As the district judge put it, the legitimate objective of creating added interbrand competition does "not immunize otherwise objectionable conduct" (A. 20). The wanton destruction of a trader by prejudicial treatment that undermines his ability to survive in the face of preferred treatment extended to neighboring competitors is no less a violation than would be a more rapid extinction by boycott. See *Klors v. Broadway Hale Stores,* 359 U. S. 207 (1959).

1. (Cont'd.)

respondent's own exhibits * * * demonstrat(ed) that (Brunswick) made a profit at two centers, * * * generated a positive cash flow at two others, * * * and closed the two centers that were unsuccessful." This record should be compared with the charts printed in the Appendix to our Petition which show a deliberate, long-standing and pervasive abuse of the deep pocket by Chrysler in the operations of its DE dealers generally, regionally, and locally, and in the operations of Chrysler Credit and Chrysler Financial, which absorbed additional losses which should have been, but were not, absorbed by the retail sales companies.

2. Respondents attempt to characterize their DE Program as paralleling those adopted by General Motors and Ford However, they offered no evidence whatever that the programs of those manufacturers had the same infirmities as Chrysler's, and the reported decisions and the statistics as to the number of antitrust cases pending in the district courts against Chrysler, General Motors and Ford (Petition, pp. 32, 35-39) tend strongly to indicate that this is not in fact so.

We use the term "wanton" advisedly. The district judge who heard the extensive evidence in this case not only concluded that it was sufficient to show "that as a result of the defendants' preferential treatment of the DE dealers Glauser Dodge was eventually forced out of business" (A. 18); he found further (A. 22) that

> ". . . defendants' desire to increase Chrysler's competitiveness on the interbrand level does not explain the reasonableness of their conduct. Indeed, this goal could have been more effectively pursued had the financial and other assistance which the defendants provided DE dealers, been extended to independent dealers as well."

Petitioner's claim that respondents engaged in a discriminatory course of action calculated to destroy petitioner was submitted to the jury by the charge of the district judge in the following words (A. 45-46):

> "[P]laintiff . . . complains that the Chrysler defendants combined or conspired in restraint of trade or commerce by adopting and pursuing the following course of conduct:
>
> "A. The creation and maintenance of better financed dealer enterprise dealerships for the purpose of penetrating the automobile market in which DE dealers competed with the plaintiff to its loss; [3]

3. Respondents argue (Brief, p. 5) that it "* * * is not in Chrysler's own interest to use its limited capital to invest in a dealership when other funds are available." Actually, by creating a DE dealership to market Chrysler products at low retail prices and heavily advertising those prices, Chrysler could lower the prices at which all Chrysler products were sold in a given market, and so increase its market penetration in those areas, and therefore its manufacturing profits. But this was accomplished at the expense not only of the DE dealerships, but of all competing private capital dealerships.

"B. Permitting DE dealers or factory stores to operate regularly in an out of trust condition and not so with Glauser;

"C. Advertising and selling cars through factory controlled outlets or DE dealers at prices which were lower than independent retail dealers, such as the plaintiff, could afford to charge; [4]

"D. Requiring private capital dealers, such as the plaintiff, to guarantee retail commercial paper while permitting competing DE dealers to sell such paper to Chrysler Credit without recourse; [5]

"E. Refusing to deliver when properly ordered new vehicles to the plaintiff in time for its opening, even

4. Respondents state (Brief, p. 9), "• • • the claim is not one of below cost pricing." This is simply not so. What the DE dealers were selling were new automobiles, and the evidence shows that those dealerships were consistently operated at a loss. The prime reason why this occurred, obviously, was that the DE operators were not charging enough money for their products, and, as a matter of fact, the evidence shows that these dealerships established gross profit margins which were significantly lower than those of the private capital dealers with which they competed (Petition, pp. 15-16). Respondents' Brief also states (p. 5) that, "• • • the dealership manager controls day to day operations and sets the prices." This is contrary to evidence that a Chrysler executive deliberately encouraged Cherry Hill Dodge to advertise new cars at their factory invoice price (Appendix below, A. 05736-37). Other evidence shows that, as soon as the first Chrysler DE operator "bought out" in South Jersey, there was a dramatic change in his method of operation. Whereas the gross profit of this dealership as a DE dealer had been $261.00 per vehicle as compared with a group average of $317.00 per vehicle during the first 6 months of 1970, the operator increased its gross profit margin to $303.00 per vehicle after he had bought out Chrysler's stock (Appendix below, A. 02711-14).

5. Contrary to a statement on page 4 of respondents' Brief, the evidence shows that Chrysler Credit offered "without recourse" financing to the DE dealers in South Jersey *before* they obtained competing bids for such business from private sources (Appendix below, A. 6316-18, A. 6250, A. 2733-35).

though an ample number of such vehicles were delivered to the DE dealers with whom the plaintiff competed;

"F. Effectively limiting by the use of recourse retail paper and other restrictions upon the plaintiff's credit the plaintiff's ability to participate in contests and specials on the same basis as competing DE dealers; and

"G. Providing superior physical facilities to DE dealers on terms which were not available to the competing private capital dealers such as the plaintiff Glauser." [6]

The court of appeals did not dispute the fact that there was evidence to support each of these claims. On the contrary, it stated (A. 46) that the "evidence offered in support of Glauser Dodge's Section 1 theory of recovery was in some respects undisputed and in other respects hotly contested." As to the contested evidence—much of it summarized by respondents in the light most favorable to the unsuccessful defendants rather than the successful plaintiff [7]—it of course suffices to say that the resolution of evidentiary disputes was a matter committed to the jury.

6. Contrary to another statement in respondents' Brief, they offered no convincing evidence that, at the time in question, private sources would have made such facilities available to their dealers on similar terms. Also, whatever was said on this subject was said by a Chrysler Realty employee whose testimony the jury had the exclusive right to evaluate (Appendix below, A. 01049-A. 01061).

7. Among other things, respondents state that Glauser Dodge income tax returns and bank statements reflected modest losses rather than modest profits and Glauser Dodge had cash flow problems and could not pay its debts toward to end of its business life. Respondents fail to state that the tax losses occurred because Glauser, like Chrysler's DE's, wrote down used cars and parts at year end to reflect uncertainties in valuations of those assets in the event of liquidation. Also ignored in respondents' recitation was the evidence, accepted evidently by the jury, to the effect that it

On what basis, then, has the court of appeals rejected the jury's verdict?

First, it asserts that respondents have not monopolized at the dealership level by forward integration, a point which was not only the subject of factual controversy,[8] but hardly dispositive of petitioner's Section 1 claim in any event.

Second, it concludes that, even if the effect of respondents' activities has been to eliminate petitioner, there

7. (Cont'd.)

was the discriminatory conduct of the respondents and their South Jersey DE dealers which produced Glauser's cash flow problems (Petition, pp. 19-20), and that, to the end, Glauser had assets sufficient to solve its cash and credit problems if Chrysler management would have accepted recommendations of local Chrysler personnel and provided Glauser with any one of several types of accommodation contemplated by the Quinn Memorandum and timely sought by Glauser (Appendix below, A. 05314; 790-793).

Respondents also mislead by ignoring the jury's verdict and giving their version of the evidence on contested issues with respect to the extent to which the DE's picked up sales previously made by Glauser (Brief, p. 4); the distance between Glauser's and the facilities of its DE competitors (30-45 minutes driving time, and much less than that for customers in intervening areas, according to Glauser), and the basis on which Glauser computed its damages (noted to be more conservative than otherwise in the district court's Opinion (A. 27)).

Also, on p. 11 of their Brief, respondents attempt to justify the entry of judgment N. O. V. in this case by citation of stipulations obtained from other lawyers in another case, with another plaintiff, and at another time.

8. Respondents' own figures show that sales by factory controlled dealerships increased from 17% to 36% nationally (A. 1) and from 20% to 42.5% regionally over a 7-year period while the policies complained of were being implemented (Appendix below, A. 01100.01). The evidence also shows that Dodge private capital dealerships disappeared at 11 of 33 locations in petitioner's trade area during that period (Appendix below, A. 05574). Also, at least one such dealer in addition to petitioner's principals did complain at the time and did testify at trial that his dealership was destroyed by the same actions complained of by Glauser (Appendix below, A. 947-58).

is abundant competition and hence no violation. We believe that this is in gross disregard of the teaching of the *Klors* case—in effect, a ruling that a lawful objective, such as promotion of interbrand competition, may justify an unlawful means; indeed, may justify it even where the objective, in the district judge's words, might "have been more effectively pursued" by giving similar support to independent dealers instead of discriminating against them. Surely, this is a matter that demands this Court's examination.

Third, the court of appeals discounts the force of petitioner's showing of destructive discrimination by the remarkable suggestion that if parties other than Chrysler had extended subsidies to petitioner's competitors that gave them advantages over petitioner, petitioner would have no cause for complaint. Thus the court states (A. 50):

> ". . . the effect on competition would be the same if the subsidies of which Glauser Dodge complains came from a source other than Chrysler. For example, if, instead of Chrysler's investments, the four DE dealers had obtained more favorable lines of credit with banks and higher private venture capital investment, their ability to subject the plaintiff to intense price competition would be the same."

To be sure, if petitioner had raised capital on unfavorable terms or had been improvident in its operations, the market might well have penalized it. There is absolutely no evidence that such is the case. Nor is there any persuasive evidence that specially advantageous terms were available to DE dealers from sources other than Chrysler. Indeed, Chrysler's own evidence is that it sponsored and supported

the DE dealers in the ways that it did because they would not have entered the field on the terms available in the marketplace (Appendix below, A. 165, A. 168, A. 3596, A. 3945). This may fully explain Chrysler's decision to support the new dealerships. It does not, however, justify gratuitous, calculated and pervasive discrimination against private capital dealers.

It is also notable that the court of appeals limits its discussion of discrimination to Chrysler's subsidization of DE dealers through "capital investments, absorption of start-up expenses, and favorable credit arrangements" (A. 59). Apart from the fact, already noted, that there is no basis for suggesting that outsiders would have undertaken to confer such benefits upon the DE dealers, we point out that the court ignores other critical aspects of Chrysler's discrimination. These include, as earlier observed:

> "C. Advertising and selling cars through factory controlled outlets or DE dealers at prices which were lower than independent retail dealers, such as the plaintiff, could afford to charge.
>
> * * *
>
> "E. Refusing to deliver when properly ordered new vehicles to the plaintiff in time for its opening, even though an ample number of such vehicles were delivered to the DE dealers with whom the plaintiff competed.
>
> * * *
>
> "G. Providing superior physical facilities to DE dealers on terms which were not available to the competing private capital dealers such as the plaintiff Glauser."

Plainly, all of these were forms of preferential treatment that Chrysler alone was in a position to bestow on its favored offspring.

Confining ourselves, for the sake of brevity, to the matter of price discrimination, we emphasize that it was unmistakably predatory to sell through DE dealers at advertised prices that the independent dealer could not profitably meet while picking up the losses incurred by the DE dealers as a result of their selling at those unremunerative prices. We assume that selling cars at retail at low advertised prices may have strengthened Chrysler vis-à-vis competing manufacturers of automobiles. There was no obstacle, however, to achieving that end by lowering wholesale prices to independent dealers so as to enable them to sell at the advertised prices.[9] The decision not to do so, but, instead, to squeeze the independents while subsidizing the company-controlled DE dealers, is the very essence of discrimination. There can be no question that conduct falling into that pattern is calculated to destroy traders, as in fact it destroyed this petitioner. To grant immunity to such conduct is incompatible, we submit, with the "rule of reason" as that concept previously has been elaborated in decisions of this Court.

II.

From the first, this Court has given great weight to jury determinations that a defendant has engaged in conduct in restraint of trade, see, e.g., *Thomsen v. Cayser*, 243

9. On page 8 of their Brief, respondents state that, for Chrysler to have supported all of its dealers as it did its DE's would have been "financially unsupportable". No witness ever testified to that effect nor was this even argued below. In any event, what made the DE's so expensive was not that they were created, but that they were operated to increase market penetration quickly. This they did by cutting retail prices. But that produced operating losses at the retail level.

U. S. 66 (1917). It has also consistently rejected assertions by a defendant that good business reasons will justify conduct of a kind antithetical to the antitrust statutes. E.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951), rejecting the claim that the fixing of maximum prices may be justified on the ground that the defendant was thereby promoting distribution of its whiskey. More particularly, we know of no decision of this or any other court holding that a jury is not legally justified in finding that a manufacturer unreasonably restrains trade when a manufacturer discriminates in favor of its factory controlled dealerships and against its private capital dealers in the manner in which the jury, the district court, and the court of appeals concluded occurred here. That such a course of action restrains trade unreasonably is the teaching of this Court in *Eastman Co. v. Southern Photo Co.*, 273 U. S. 359 (1927), and *Poller v. Columbia Broadcasting System*, 368 U. S. 464 (1962), as well as many courts of appeals, including *Reynolds Metal Company v. F. T. C.*, 309 F. 2d 223, 230 (D. C. Cir. 1962); *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F. 2d 1336 (9th Cir. 1970); *Rea v. Ford Motor Co.*, 497 F. 2d 577, 590 (3rd Cir. 1974); *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338 (3rd Cir. 1975); and *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F. 2d 79 (6th Cir. 1976), cert. denied, 393 U. S. 844 (1976).

Respondents have made no effort to distinguish between the legal principles recognized in those cases and the principles which the jury and the district court applied here. Furthermore, contrary to respondents' contentions, those authorities are consistent, and not in conflict, with *England v. Chrysler*, 493 F. 2d 269 (9th Cir. 1974), which, while distinguishable from our case on its facts, explicitly recognized that:

> "* * * Predominent emphasis on market penetration, which results in the deliberately reckless operation of a subsidized dealer and which has the inevitable effect of forcing competing and non-subsidized dealers to function at an unprofitable level, could, if proved, constitute an unreasonable restraint of trade" (493 F. 2d at 273).

The charts on A. 1-6 clearly justified the jury's conclusion here that the respondents operated their subsidized dealerships nationally, regionally and in southern New Jersey in a manner which was "deliberately reckless", in terms of their willingness to sustain repeated losses,[10] and that this did in fact produce significant market penetration on the part of such dealerships. The charts on A. 5-6 confirm that Chrysler Credit and Chrysler Realty, which supported and further subsidized the factory controlled dealerships, also operated in a manner which, when viewed independently, can only be characterized as "deliberately reckless". Furthermore, when the overall statistics are matched with the evidence (A. 7) concerning the ridiculously low gross profit levels at which the South Jersey DE dealers forced the plaintiff and other privately capitalized dealers in the area to function, it is equally clear that the jury had a sound basis for concluding, to paraphrase the *England* opinion, that defendants' policies had "* * * the inevitable effect of forcing competing and non-subsidized dealers to function at an unprofitable level

10. It should also be noted that the DE's sustained these losses even though, unlike Glauser Dodge, they operated in subsidized facilities, had priority over Glauser Dodge in deliveries of new automobiles and were relieved of repossession losses of $1200 per automobile and the necessity of making short term loans by their non-recourse, no reserve arrangements with Chrysler Credit; also, by Chrysler Credit's permitting the DE's to be out of trust for months at a time (A. 13).

and" could, therefore, "° ° ° constitute an unreasonable restraint of trade".

Respondents also seek to suggest that this case is lacking in significant economic effects on the ground that there was no evidence that forward vertical integration resulted from the defendants' policies. In similar vein, they argue that the effects of the DE program were transient, i.e., Chrysler controlled the DE dealers only temporarily. If these suggestions were correct—and we submit that they are not—they would not support a legal conclusion that the destruction of petitioner by means that were both discriminatory and gratuitous would absolve Chrysler of liability. In fact, both suggestions are misleading.

At no time prior to the decision of the court of appeals did the respondents ever argue *that they were entitled to judgment as a matter of law* because there was *no evidence* that their policies produced "forward vertical integration". Plainly, there is evidence (A. 1; fn. 8, *supra*) supporting a contrary conclusion. Respondents' current arguments are based on their version of the facts respecting the South Jersey DE dealers. What the evidence actually shows is that none of these DE operators was able to acquire Chrysler's stock by completely repaying Chrysler's investment (Appendix below, A. 2522, 2704-11, 2718-32). Also, even when they bought out the dealerships, as the Chrysler chart reprinted as Exhibit A-1 shows, were still part of Chrysler's Dealer Enterprise Program because they were still operating in Chrysler facilities, i.e., they were still paying rents which, unlike those available to private capital dealers, included no increments for dealer development costs, depreciation, mortgage amortization, or profit. Furthermore, even when they "bought out", those operators were still subject to Chrysler control in that they were both subsidized and operating under leases which required

that they continue to sell Chrysler products if they wished to continue to operate on the premises (Appendix below, A. 943). As a result, by 1973, 72.5% of new Dodge sales in South Jersey were being made by Chrysler controlled and Chrysler subsidized dealers (Appendix below, A. 01100-01).

As we also pointed out in our Petition (p. 40), the underutilization of manufacturing capacity which allegedly gave rise to the DE Program was eliminated by the time the Glausers began business. The evidence also shows that, whatever success the South Jersey DE dealerships eventually achieved in the marketplace was gained, at least in substantial part, at the expense of privately capitalized dealers such as the plaintiff with which the DE dealers originally competed. The private dealerships were not temporarily injured by the discriminatory features of the DE Program; they were first squeezed, then ultimately destroyed.

CONCLUSION.

This is a case in which the evidence was plainly sufficient to show "deliberately reckless operation of °°° subsidized dealer(s)" (*England v. Chrysler, supra,* 493 F. 2d at 273), inevitably forcing independently financed dealers to the wall. The jury so found under instructions that carefully identified the specific claims of preferential and predatory conduct charged to Chrysler by the plaintiff dealer. The district judge upheld that verdict in an opinion that not only found the supporting evidence sufficient, but concluded that Chrysler's alleged objective of promoting interbrand competition could have been "more effectively pursued" by supporting, rather than discriminating against, independent dealers. The court of appeals has not found the evidence insufficient to support

the claims submitted to the deliberations of the jury. Rather, it has adopted a view of Section 1 of the Sherman Act and of the "rule of reason" that departs sharply from accepted doctrine and demands this Court's examination. The importance of the antitrust issue thus presented is underscored by the fact that the antitrust defendants in this litigation are members of a highly concentrated industry and that the antitrust plaintiff is a typical member of a large and important, but highly vulnerable, class—that consisting of the nation's franchised dealers.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

RALPH S. SPRITZER,

TOM P. MONTEVERDE,
MORRIS L. CHUCAS,
MAX L. LIEBERMAN,
PELINO, WASSERSTROM, CHUCAS
& MONTEVERDE,
Attorneys for Petitioner.